IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1931

UNITED STATES GYPSUM COMPANY,
NATIONAL GYPSUM COMPANY,
GEORGIA-PACIFIC CORPORATION,
THE CELOTEX CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioners, United States Gypsum Company ("USG"), National Gypsum Company ("National"), Georgia-Pacific Corporation ("G-P") and The Celotex Corporation ("Celotex"), file this reply brief, pursuant to Rule 24(4), in support of their petition for certiorari. The purpose of this brief is to redirect the Court's attention to the actual issues raised by the petition, which the government has either misstated or ignored, and to correct several of the government's serious misrepresentations of the record.

1. Contrary to the Government's Contention, This Petition Raises Substantial Issues of Law, Not Just the Sufficiency of the Evidence in This Case.

The government's brief in opposition relies entirely on the erroneous contention that the sole issue raised by the petition is a "'routine contention of factual error.'" (U. S. Br. p. 4) [1] Although the ultimate question before the court of appeals was the sufficiency of the evidence at the first trial, in deciding that question, the court below applied the wrong *legal* standards. It is the correctness of those legal standards which is the focus of this petition.[2] These are issues of law, not fact, and, as the Petition demonstrates, their importance transcends this particular case.

1. The Brief for the United States In Opposition to this petition is cited by the notation "U. S. Br." The petition itself is designated as the "Petition." The Appendix in this Court in its initial consideration of this case 438 U. S. 422 ("Gypsum") is designated by "A" and is preceded by the volume number (in Roman numerals) and followed by the page number.

2. The government surprisingly suggests that somehow petitioners' challenge to the court of appeals' erroneous application of *Gypsum* in this double jeopardy appeal is premature and can only be made after petitioners have been retried and their double jeopardy rights irretrievably lost. (U. S. Br. p. 5 fn. 4) Certainly this Court's decision in *Burks v. United States*, 437 U. S. 1 (1978) contemplates, as part of the constitutional protection against retrial where the evidence at the first trial was insufficient, that the sufficiency of the evidence be judged by the proper legal standard; otherwise, the guarantee is meaningless. Moreover, the notion that a double jeopardy claim cannot be fully resolved until after the second trial was repudiated in *Abney v. United States*, 431 U. S. 651 (1977). Finally, the government has conceded that the sufficiency of the evidence must be tested under the standards set forth in *Gypsum*. (Petition, p. A4, fn. 1)

2. The Government's Assertion That the Court of Appeals Followed This Court's Decision in Gypsum Misrepresents Petitioners' Contentions, Misrepresents the Trial Record and Dramatizes the Need to Grant Certiorari in This Case.

The government expressly adopts the court of appeals' assumption that the statute of limitations period "is simply irrelevant to the issue of verification." (U. S. Br. p. 11) It tries to support that proposition with an argument that misstates the trial record and the petitioners' contentions.

The court of appeals was unable to point to any evidence of criminal intent within the statute of limitations period. Rather, to supply the missing intent element, it relied on the testimony of officials who had either left their company's employ or were no longer engaged in verification by the opening of the statutory period. As the Petition has already pointed out, this approach conflicted with this Court's prior decision in this case on the requirement of criminal intent and on the nature of verification. (Petition, pp. 8-14)

In an effort to bridge the gap in the court of appeals' opinion, the government tries to show that persons having the requisite criminal intent in fact verified in the statutory period. But the government's handiwork ruthlessly misstates the record. Its assertion that USG "appears" to have verified in the statutory period (U. S. Br. p. 6 fn. 7), misrepresents the testimony of both of the witnesses cited. Simpson and Thompson were, at most,[3] testifying about the date on which they had been informed USG had *already* stopped verifying. Neither witness testified to when USG stopped or that USG verified in the statutory period,

3. In fact, the only reasonable construction of Simpson's testimony is that it did not refer to the timing of any discussion about when USG stopped verifying, but about the timing of an entirely different discussion. (See Petition, p. 10 fn. 4.)

and all of the other evidence in the record shows that USG instructed its personnel, months before the beginning of the statutory period, not to verify on gypsum products and that this instruction was obeyed. (Petition, p. 10 fn. 4) Moreover, the government's statement that "USG cautioned its officials not to keep any written records of competitor contacts" in order "to avoid any 'inference' of illegal activity" (U. S. Br. pp. 6-7), is totally without foundation, as the document cited says absolutely nothing about written records. The caution given in that document was to avoid the contacts themselves, not to avoid any record of them. (V A. 2651-55)

The only National witness cited in the government's brief was Atwell, who the government claimed, verified "until at least January 1969." (U. S. Br. p. 6) The assertion is unsupported by the record. There is no evidence that Atwell verified after the beginning of the statutory period on December 27, 1968. (See Petition, p. 11 fn. 5.)

The government also takes undue liberty with the record in claiming that G-P's Meyer verified "until his retirement in June 1969." (U. S. Br. p. 5) While Meyer did testify affirmatively to a question asking whether he verified "from time to time from the period 1960 to the time of his retirement" (II A.533-34), this in no way establishes that any of those contacts occurred after the critical limitations date of December 27, 1968, particularly where Meyer also testified that he did not recall any verification at all in 1969. (II A.562-64)

Finally, the government cites the testimony of Celotex's Jarrett. While Jarrett admittedly verified in the statutory period, the government points to no evidence that his purpose in doing so was to stabilize prices. In the testimony cited by the government, Jarrett acknowledged that one of the benefits of verifying was that Celotex would not sacrifice any more money than it had to in order to get a sale, but also testified that his purpose in verifying was to comply with the Robinson-Patman Act. (II A. 833-34, 835-36) Jarrett said nothing about the hypothetical impact of verification on market prices generally, and his testimony obviously does not evidence the kind of distinct purpose to produce anticompetitive effects required under this Court's more elevated standard of criminal intent. (Petition, p. A40 fn. 21; 438 U. S. at 444-45 fn. 21)

The government's claim that the price war "cannot serve to legitimate verification in the statutory period because discounting and verification had begun prior to December 27, 1968" (U. S. Br. p. 11) is a non sequitur, misstates petitioners' contentions, and attempts to shift the burden of persuasion to petitioners to prove their innocence. It is not the petitioners' burden to "legitimate" verification; it is the government's burden to prove, beyond a reasonable doubt, that the isolated verification which did occur in the statutory period was done with the distinct purpose of fixing prices. The price war is a critical circumstance which, consistent with this Court's prior opinion in this case, must be considered in making that determination. (Petition, p. A36 & fn. 16, pp. A61-62 & fn. 38; 438 U. S. at 441 & fn. 16, 438 U. S. at 463-465 & fn. 38) The fact that the price war actually began prior to December 27, 1968 only underscores the absence of criminal intent during the statutory period.

The government's reliance on misstatements of the record and specious contentions in an effort to explain the court of appeals' decision merely highlights why the analytical basis for that decision is unsound.[4] If this kind

4. The government further misrepresents the record in its attempt to gloss over the price war waged prior to and throughout the statutory period. In support of the assertion that defendants' price cutting activity in 1968 was selectively aimed at the single-plant producers in the Southwest, the government cites a document

of slapdash argument is sufficient in the lower courts to sustain criminal convictions, then there is something radically wrong with the way this Court's decision in *Gypsum* is being applied, and certiorari should be granted in this case to rectify the problem.

3. The Government Would Shift the Burden of Proving Withdrawal to Petitioners.

The government does not respond at all to the legal question of whether the court of appeals can properly shift the burden of persuasion on withdrawal in a criminal conspiracy case to the defendant. Yet the government's own evidentiary contentions rely on just such a shifting of the burden. The notion that USG can be held criminally liable for merely failing to rescind in writing a pre-statutory authorization to verify, when there was no credible evidence of USG verification in the statutory period, but there was uncontradicted testimony by several witnesses that oral instructions to stop verifying had been given prior to the statutory period (U. S. Br. pp. 6, 10 fn. 12); the notion that it is the duty of a criminal defendant to adduce evidence that "differentiate[s] between the pre-statutory

4. (Cont'd.)
which does not purport to be an exhaustive listing of competitive activity, but describes competitive activity in the Southeast and in San Francisco, markets that are not served by single-plant producers. (Ct. of Appeals App., 1316 ex) (U. S. Br. p. 11 fn. 15) In support of its bald and patently untrue assertion that petitioners' prices in 1969 "paralleled those in 1965" (id.) the government cites nothing at all. Nor can the Government cite any evidence whatever supporting its fancied assertion that "during the statutory period USG also continued to use previously agreed-upon list prices, credit terms, and packaging and handling restrictions." (U. S. Br. p. 6, fn. 7) In an effort to show that the record contained evidence of anticompetitive effects, the government cites only evidence of price levels which were higher in some areas and at some times than in others, oblivious to the distinction between merely higher prices, which have no antitrust significance, and uniform or stable prices.

and statutory periods" (U. S. Br. p. 10); and the notion that it is a criminal defendant's duty "to legitimate verification in the statutory period" (U. S. Br. p. 11) all reflect a clear shifting of the burden of persuasion on withdrawal. The legality of that shifting presents an important constitutional issue, which cannot be avoided in this case. (See Petition, pp. 14-17.)

4. The Government Endorses the Court of Appeals' Amendment of the Indictment.

The government's effort to justify the court of appeals' failure to require proof beyond a reasonable doubt as to each of the three objectives of the conspiracy charged in the indictment relies solely upon the contention that the court was entitled to redraft the indictment to eliminate the second and third objectives and subsume them into the first. (U. S. Br. p. 12) This contention has been fully refuted, and the importance of the issue demonstrated, in the initial Petition. (See Petition, pp. 17-24.) Moreover, the court of appeals' decision is predicated on the assumption that "terms and conditions of sale are really components of price." (Petition, p. A9) This places the decision below squarely in conflict with a case decided by the Ninth Circuit subsequent to the filing of the Petition in this Court. In *Catalano, Inc. v. Target Sales, Inc.*, 1979-2 T. C. ¶ 62,805 (9th Cir. 1979) the Ninth Circuit expressly recognized that credit-fixing is not synonymous with price-fixing. This is an antitrust issue of broad significance beyond its importance in this case, as to which the conflict in the circuits should be resolved.

5. Conclusion.

The government's brief demonstrates the error and injustice which results, and will continue to result if not corrected, from the erroneous legal standards applied by the court of appeals in this case. In order to assure proper enforcement of this Court's prior decision in this case, the petition for writ of certiorari should be granted.

Respectfully submitted,

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